

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ARTHUR LEWIS JONES

Claimant

VS.

FRY-WAGNER MOVING & STORAGE, INC.

Respondent

AND

VANLINER INSURANCE COMPANY

Insurance Carrier

Docket No. 189,746

ORDER

Claimant requested review of the Award dated November 30, 1995, entered by Administrative Law Judge Robert H. Foerschler. The Appeals Board heard oral argument on February 20, 1996.

APPEARANCES

Steven D. Treaster of Overland Park, Kansas, appeared for the claimant. Stephen P. Doherty of Kansas City, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability benefits for a whole body functional impairment. Claimant asked the Appeals Board to review the Judge's finding of nature and extent of disability. That is the only issue before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Administrative Law Judge should be affirmed.

The parties stipulated that claimant sustained personal injury by accident arising out of and in the course of employment with respondent on May 4, 1994. At the time of the accident, claimant had worked for the respondent for approximately eight years in various positions as an assistant manager and furniture mover.

As a result of the accident, claimant injured his neck, back, and both shoulders. According to claimant, before the May 1994 accident he had experienced only minor low back strain.

After the accident, claimant underwent physical therapy and work hardening as prescribed by orthopedic surgeon F. Daniel Koch, M.D. Claimant eventually returned to work for the respondent on August 22, 1994, and worked through August 27, 1994. Despite the fact that respondent accommodated claimant and provided him with light duty work, claimant testified he experienced increased symptoms because of being on his feet. Because of those difficulties, claimant did not return to work

for the respondent after August 27, 1994, and sought unemployment benefits. At the time of regular hearing, claimant remained unemployed although he testified he had been seeking work.

Claimant's medical expert witness, board-certified orthopedic surgeon Edward J. Prostic, M.D., testified that before the accident claimant had a 2 percent whole body functional impairment as a result of lumbar spondylolisthesis. Dr. Prostic believed claimant sustained an additional 10 to 15 percent whole body functional impairment due to cervical, lumbar, and shoulder sprains, coupled with aggravation of the preexisting spondylolisthesis, as a result of the work-related accident. Dr. Prostic saw claimant on August 30, 1994, three days after claimant's last day of work for the respondent. The doctor believed that claimant was then not able to return to his regular duties and needed additional treatment such as anti-inflammatory medications, intermittent heat and massage, therapeutic exercise, and, perhaps, several additional weeks of work hardening. Further, referring to Dr. Koch's medical restrictions placed on claimant in August 1994, Dr. Prostic testified, "At the time I saw him those restrictions were appropriate."

The Administrative Law Judge appointed Vito J. Carabetta, M.D., to perform an independent medical evaluation. Dr. Carabetta reported that claimant had a 4 percent whole body functional impairment for the back sprain and a 5 percent whole body functional impairment for low back soft tissue injuries which resulted from the May 4, 1994, accident. He also reported that before the accident claimant had a 7 percent whole body functional impairment due to spondylolysis and spondylolisthesis. Dr. Carabetta did not address permanent work restrictions because Dr. Koch had previously done so.

The Appeals Board agrees with the Administrative Law Judge's conclusion that claimant has failed to prove a work disability greater than his functional impairment. Therefore, pursuant to K.S.A. 44-510(e) claimant's permanent partial disability benefits are limited to the functional impairment rating.

The evidence supports the conclusion that respondent provided claimant with light duty work within his medical restrictions and limitations. Although claimant complained of problems with standing, there is no medical testimony which would indicate that he is unable to, or should not, stand. As claimant testified, he felt his symptoms increased when he returned to work in August 1994 because he was on his feet. The evidence fails to establish that claimant was medically restricted from standing or that the job in question violated claimant's permanent medical restrictions in some other manner.

When a worker declines accommodated employment that does not violate their permanent medical restrictions and limitations, the public policy considerations limiting permanent partial disability benefits to the functional impairment rating are applicable as set forth in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995). The legislature did not intend to allow a worker to decline accommodated employment which falls within their capabilities. In such cases the respondent is entitled to the conclusive statement of law contained in K.S.A. 44-510e that a worker shall not be entitled to receive permanent partial disability compensation in excess of the percentage of functional impairment.

Claimant also failed to prove what medical restrictions he must now observe as a result of the May 1994 accident. The restrictions contained in an August 1994 letter from Dr. Koch admitted at preliminary hearing cannot be used in the absence of the parties' stipulation or the doctor's testimony. See K.S.A. 44-519. Further, although Dr. Prostic testified that he felt Dr. Koch's restrictions were appropriate as of the date of evaluation, Dr. Prostic did not go on to state whether they were permanent, or only temporary in nature to last only until such time as claimant's increased symptomatology had resolved. It must be remembered that Dr. Prostic saw claimant only three days after claimant's last day of work for the respondent and claimant had told Dr. Prostic that he had increased symptoms following his recent work activities.

The Appeals Board also agrees with the Administrative Law Judge's analysis that claimant is entitled to permanent partial disability benefits based upon a 9 percent whole body functional impairment. That conclusion is supported by Dr. Carabetta's opinion which the Appeals Board finds to be persuasive.

The Appeals Board hereby adopts the Administrative Law Judge's findings and conclusions as set forth in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated November 30, 1995, entered by Administrative Law Judge Robert H. Foerschler should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven D. Treaster, Overland Park, KS
Stephen P. Doherty, Kansas City, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director